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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)
)
TRINITY BROADCASTING OF)
FLORIDA, INC.,)
)
For Renewal of License of)
Television Station WHFT(TV))
Miami, Florida,)
)
GLENDALE BROADCASTING)
COMPANY,)
)
For Construction Permit for)
New Television Station in)
Miami, Florida,)
)
)
)

MM Docket No. 93-75

MM Docket No. 93-156 /

BRCT-940202KE

BPCT-940426KG

BRCT-930921LM

BPCT-931230KF

BRCT-930730KF

BPCT-931028KS

Et al.

To: Magalie Roman Salas, Secretary
for direction to
The Commission

JOINT REQUEST FOR APPROVAL OF
AMENDED AND SUPERCEDING SETTLEMENT AGREEMENT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
SUMMARY.....	iii
I. Facts and circumstances of filing this joint request.....	3
II. Approval of the settlement agreement complies with Section 111(d) of the Communications Act and a waiver of FCC Rule Section 73.3523 is justified.....	5
Statutory provision.....	5
FCC regulations.....	5
More than six years of bona fide litigation without expectation of settlement.....	6
Litigation to the issuance of an Initial Decision (and more) demonstrates a bona fide application.....	6
Delays due to circumstances beyond the control of the parties.....	7
Waiver of ban on any payment where proceedings have not reached the Initial Decision stage.....	8
Waiver of any limitation on payment, whether before or after an Initial Decision, in view of new statutory prohibition against future license renewal challenges.....	9
FCC policy decision in <u>EZ Communications, Inc.</u> to waive limits on settlements of comparative renewal proceedings antedating the Telecommunications Act of 1996.....	9
Impasse on adoption of valid new comparative criteria for eight grandfathered renewal proceedings of which five are represented by the instant case.....	10
The Communications Act does not impose limitation on settlements of bona fide applications.....	11

FCC's broad authority to approve settlement under the good cause showing here.....	12
These factors have been reflected in the arms- length settlement of the litigating parties, which should be honored as a preferred means of resolution of the litigation.....	13
III. Supportng declarations and conclusion.....	14
Exhibits	
1 Amended and Superceding Settlement Agreement	
2 Declaration of George F. Gardner	
3 Declaration of James C. Gates	
4 Declaration of Terrence M. Hickey	
5 Declaration of Jane P. Duff	

SUMMARY

The Amended and Superceding Settlement Agreement provides for the unconditional dismissal of all competing applications of Glendale Broadcasting Company and Maravillas Broadcasting Company relative to the renewal applications of Trinity Broadcasting of Florida, Inc., Trinity Christian Center of Santa Ana, Inc., Trinity Broadcasting of New York, Inc. and National Minority T.V., Inc. in Miami, Florida, Monroe, Georgia, Santa Ana, California, Portland, Oregon, and Poughkeepsie, New York. This agreement has been entered into in light of the Commission's Decision in the Miami comparative renewal proceeding released April 15, 1999 and is consistent with paragraph 128 of that Decision, slip opinion, FCC 98-313.

The Amended and Superceding Settlement Agreement relates to five of the eight grandfathered comparative renewal proceedings currently pending before the Commission under the law prior to the changes adopted in the Telecommunications Act of 1996. Approval of the agreement will substantially reduce the number of such grandfathered proceedings and may motivate parties in the three other proceedings to take similar action. Expeditious consideration is requested in accordance with paragraph 214 of the Commission's First Report and Order regarding implementation of Section 309(j) of the Communications Act, released August 18, 1998, 13 FCC Rcd. 15920, 16006.

This Joint Request provides an analysis of the policy and legal precedent and considerations which support approval of the subject agreement as serving the public interest.

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Washington, D.C. 20554

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Television Station WHFT(TV))
Miami, Florida)

MM Docket No. 93-75

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GLENDALE BROADCASTING)
COMPANY)

For Construction Permit for)
New Television Station in)
Miami, Florida)
_____)

TRINITY CHRISTIAN CENTER OF)
SANTA ANA, INC.)

For Renewal of License of)
Television Station WHSG(TV),)
Monroe, Georgia)

MM Docket No. 93-156

_____)
GLENDALE BROADCASTING)
COMPANY)

For Construction Permit for)
New Television Station in)
Monroe, Georgia)
_____)

TRINITY BROADCASTING OF)
NEW YORK, INC.)

BRCT-940202KE

For Renewal of License of)
Television Station WTBY(TV),)
Poughkeepsie, New York)

_____)
MARAVILLAS BROADCASTING)
COMPANY)

BPCT-940426KG

For Construction Permit for)
New Television Station in)
Poughkeepsie, New York)
_____)

NATIONAL MINORITY T.V., INC.)	BRCT-930921LM
For Renewal of License of)	
Television Station KNMT(TV),)	
Portland, Oregon)	
MARAVILLAS BROADCASTING)	BPCT-931230KF
COMPANY)	
For Construction Permit for)	
New Television Station in)	
Portland, Oregon)	
TRINITY CHRISTIAN CENTER OF)	BRCT-930730KF
SANTA ANA, INC.)	
For Renewal of License of)	
Television Station KTNB-TV,)	
Santa Ana, California)	
MARAVILLAS BROADCASTING)	BPCT-931028KS
COMPANY)	
For Construction Permit for)	
New Television Station in)	
Santa Ana, California)	
SIMON T)	BPCT-931101LF
For Construction Permit for)	
New Television Station in)	
Santa Ana, California)	

To: The Commission

JOINT REQUEST FOR APPROVAL OF
AMENDED AND SUPERCEDING SETTLEMENT AGREEMENT

1. Glendale Broadcasting Company ("Glendale"), Maravillas Broadcasting Company ("Maravillas"), Trinity Broadcasting of Florida, Inc. ("TBF"), Trinity Christian Center of Santa Ana, Inc. ("TBN"), Trinity Broadcasting of New York, Inc. ("TBNY") (TBF, TBN and TBNY are collectively referred to as "Trinity") and National Minority T.V., Inc. ("NMTV"), pursuant to 47 C.F.R.

§73.3523, jointly request approval of the Amended and Superceding Settlement Agreement attached as Exhibit 1. Upon occurrence of conditions described below, this would result in dismissal of all five applications of Glendale or Maravillas, i.e., the same relief as requested in the joint request for dismissal of the application of Simon T for Santa Ana, California, currently pending before the Mass Media Bureau.

I.

Facts and circumstances of filing this joint request

2. In 1991, Glendale filed construction permit applications that are mutually exclusive with the renewal application of TBF in Miami, Florida (call letters WHFT) and the renewal application of TBN in Monroe, Georgia (call letters WHSG). These applications were the subject of hearing proceedings, resulting in a Decision of the Commission, released April 15, 1999, in which TBF's renewal application for WHFT and Glendale's mutually exclusive application were both denied. No decision has been rendered with regard to the Monroe applications.

3. In 1993 and 1994, Maravillas filed construction permit applications that are mutually exclusive with the renewal application of TBN in Santa Ana, California (call letters WTNB-TV), the renewal application of TBNY in Poughkeepsie, New York (call letters WTBV) and the renewal application of NMTV in Portland, Oregon (call letters KNMT). These applications have not been designated for hearing.

4. In March-April 1998, the parties entered into a settlement agreement and filed a joint request for its approval.

Under that agreement, consideration would have been paid for dismissal of all five applications filed by Glendale or Maravillas upon the grant of all five renewal applications filed by Trinity or NMTV. The Commission's recent decision in the Miami proceeding denied approval of that agreement, stating:

...the settlement agreement, which is premised on the grant of TBF's application must be rejected. (Because Glendale's application would be dismissed under the settlement, Glendale's qualifications are not relevant to whether the settlement can be approved.) We will, therefore, deny the Joint Requests for Approval of Settlement Agreement now before us. However, since we have also found that the loss of station WHFT(TV) is a sufficient deterrent to future misconduct by TBN-related entities, the parties may submit an amended settlement covering the stations other than WHFT(TV). Without expressing any view on whether such a settlement agreement would be approved by the Commission, TBF's disqualification in this proceeding would be no bar to approval of any such settlement insofar as the settlement otherwise complies with all of our rules and policies.

Slip opinion, FCC 98-313, at ¶128.

5. In light of the Commission's Decision including the quoted statement, the parties have entered into the Amended and Superceding Settlement Agreement. This agreement reflects an approximately 50% reduction in the amount of the consideration for the unconditional dismissal of the applications of Glendale or Maravillas in Monroe, Georgia, Santa Ana, California, Portland, Oregon and Poughkeepsie, New York. The agreement provides for the unconditional dismissal of Glendale's Miami application as well. The new agreement is not contingent upon any ruling on any of the subject Trinity or NMTV applications, nor upon settlement with any other applicant or party, but only upon Commission approval of the agreement. As shown in the

passages that follow, the agreement complies with the Commission's rules and policies, and should be approved.

II.

Approval of the settlement agreement complies with Section 311(d) of the Communications Act and a waiver of FCC Rule Section 73.3523 is justified

6. Statutory provision. Section 311(d) of the Communications Act, 47 U.S.C. §311(d), governs the Commission's disposition of any settlement agreement proposed by a renewal applicant and its challengers. Section 311(d) provides that the Commission shall approve such an agreement if the agency determines that it meets two requirements: "(A) the agreement is consistent with the public interest, convenience and necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement."

7. FCC regulations. In 1989, after notice and comment rulemaking, the FCC concluded that some parties were filing applications against renewal applicants, not to secure a broadcast license but solely to obtain monetary settlements, and the agency determined that restrictions were needed to curb the abuses.¹ As a result, the FCC adopted restrictions on the timing and amount of settlement payments. The new rule banned all payments to competing applicants for the withdrawal of an application prior to release of an Initial Decision in a comparative renewal proceeding.² The new rule allowed

¹ Broadcast Renewal Applicants (Abuses of Comparative Renewal Process), 66 RR2d 708, 715 (1989).

² 47 C.F.R. §73.3523(b)(1).

settlement payments after release of an Initial Decision but restricted such payments to reimbursement of the legitimate and prudent expenses incurred by the withdrawing party in filing and litigating its application.³

8. More than six years of bona fide litigation without expectation of settlement. In this case, waiver of both the temporal and monetary limits is appropriate and will serve the public interest. The applications of Glendale in 1991, and the subsequent Maravillas applications, were filed after the renewal settlement restrictions in Section 73.3523 had already been adopted (in 1989), and such restrictions of necessity governed their expectations at the time of filing. At the time the initial settlement agreement was entered into in March 1998, the prosecution of the applications had been in process for more than six years. Today, make that seven years.

9. Litigation to the issuance of an Initial Decision (and more) demonstrates a bona fide application. In adopting Section 73.3523, the FCC stated that it was pegging the permissibility of payment to release of an Initial Decision because perseverance through that point in a proceeding was indicative of good faith:

By banning all settlement payments through the Initial Decision stage, we are further reducing the potential for abuse. First, we are increasing the likelihood that only serious, bona fide applicants will have the opportunity to settle out their competing applications. It is time consuming and expensive to litigate an application through the initial decision stage. Moreover, an applicant that makes it through the Initial Decision stage has demonstrated that it is willing to develop a complete record on all

³ 47 C.F.R. §73.3523(c)(1).

pertinent hearing issues including technical issues, standard comparative issues and any basic qualifications issues designated...For these reasons, we believe that an applicant's prosecution of its application through the Initial Decision stage is a persuasive indication of the bona fides of the application.⁴

Thus, prosecution at least through the Initial Decision stage is compelling evidence of a bona fide application.

10. Delays due to circumstances beyond the control of the parties. While a hold was placed on the three Maravillas applications and also completion of litigation of the Monroe application of Glendale, in part, to await the outcome of the Miami proceeding, the comparative issues in all cases were on hold for other reasons totally beyond the control of the settling parties. As the Commission acknowledged in waiving the temporal restriction in Section 73.3523(b)(1) for a 90-day period in late 1995, the United States Court of Appeals for the District of Columbia Circuit in 1993 invalidated the integration criterion used by the FCC to select among applicants in comparative proceedings.⁵ As a result, the FCC effectively "froze" all comparative cases, halting the pre-designation processing of comparative applications and halting completion of adjudications of previously-designated comparative renewal proceedings while it re-examined its comparative criteria in light of the Bechtel

⁴ Broadcast Renewal Applicants, 66 RR2d at 715 (footnote omitted)

⁵ FCC Public Notice, "FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy," 10 FCC Rcd. 12182 ("Waiver Public Notice"), discussing Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. 1993).

decision.⁶ As the Waiver Public Notice further explained, the United States Supreme Court decision in Adarand Constructors v. Pena, 515 S.Ct. 2097 (1995), also required re-evaluation of the consideration that the FCC gives to race in comparative proceedings.⁷

11. Waiver of ban on any payment where proceedings have not reached the Initial Decision stage. Because of the delay occasioned by Bechtel, the FCC's "freeze" on the processing of comparative applications, and Adarand, none of which applicants such as the settling parties here could have anticipated, the Commission ruled that it was appropriate to waive Section 73.3523(b)(1) and allow monetary settlements of renewal cases in advance of release of an Initial Decision. For the 90-day period following September 15, 1995, the FCC allowed parties who had not yet received an Initial Decision in their cases to dismiss their applications in exchange for reimbursement of the legitimate and prudent expenses they had incurred.⁸ The same reasons that justified waiver of the temporal limit in 1995 continue to support such a waiver for the four challenging applications which have not yet proceeded to the issuance of an Initial Decision, i.e., the Monroe, Portland, Poughkeepsie and Santa Ana, applications.

⁶ Public Notice, "FCC Freezes Comparative Proceedings," 9 FCC Rcd. 1055 (1994); FCC Public Notice, "Modification of FCC Comparative Proceedings Freeze Policy," 9 FCC Rcd. 6689 (1994).

⁷ Waiver Public Notice, 10 FCC Rcd. at 12182.

⁸ Id.

12. Waiver of any limitation on payment, whether before or after an Initial Decision, in view of new statutory prohibition against future renewal challenges. Even more significant changes have taken place since the Bechtel, Adarand and FCC freeze developments leading to the 1995 waiver for a 90-day period. These changes compel waiver of the limit on the amount of the settlement payment to be made for dismissal of applications, whether before or after the release of the Initial Decision. The Telecommunications Act of 1996 added a new Section 309(k) to the Communications Act. This section eliminates the right of challengers to file applications against an incumbent licensee's renewal application.⁹ Thus, the Congress has removed any incentive or opportunity for future challengers to initiate comparative renewal proceedings and rendered Section 73.3523 a nullity.¹⁰ Without any prospective incentive or opportunity to file and precipitate a hearing, the Commission's rules no longer need to address limits on settlements of the few grandfathered hearings as a means of deterring future non-bona fide filings, and enforcement of the rule no longer serves any public interest purpose.

13. FCC policy decision in EZ Communications, Inc. to waive

⁹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁰ In adopting the restrictions in Section 73.3523, the FCC, recognizing that challengers had the opportunity, incentive and mechanisms to file non-bona fide applications intended only to secure a monetary pay-off, said that it was addressing the incentives and the mechanisms that helped to give rise to such filings. Broadcast Renewal Applicants, 66 RR2d at 715. Congress has now acted to remove the underlying opportunity.

limits on settlements of comparative renewal proceedings antedating the Telecommunications Act of 1996. Following enactment of the Telecommunications Act of 1996, the Commission adopted a policy decision in EZ Communications, Inc., 12 FCC Rcd. 3307 (1997). It approved settlement of a comparative renewal proceeding, which had not reached the point of an Initial Decision, without regard to amounts expended in prosecution of the challenging application. It thus waived Section 73.3523 both with regard to temporal and monetary limitations. Citing the statutory change, the Commission held "Under special circumstances involving comparative renewal proceedings...we believe that the requested waiver will not undercut the purpose of the rule and that it will further the public interest." ¹¹ The Commission intended this to be a policy statement for other cases, stating: "Other requests involving similar comparative renewal proceedings will be considered under this precedent." ¹²

14. Impasse on adoption of valid new comparative criteria for eight grandfathered renewal proceedings of which five are represented by the instant case. To our best knowledge, there are only eight license renewal challenges currently pending before the Commission under the law prior to the Telecommunications Act of 1996, all of which were frozen pending resolution of the impasse on comparative hearing factors. The Commission has concluded its rulemaking proceeding in which that

¹¹ 12 FCC Rcd. at 3308.

¹² Id.

impasse was the subject of inquiry and comment. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 13 FCC Rcd. 15920 (1998). However, no comparative criteria were adopted. The Commission, in effect, leaves it to the parties to present evidence relevant to the public interest "as nearly as possible" under standards prior to the Bechtel decision. Surely, the Commission does not look forward to trying comparative renewal hearings in such a no-man's land. Indeed, it stated:

In these circumstances, we remain willing, where the circumstances afford assurance that the competing applications were not filed for speculative or other improper purpose, to waive the limitations on payments to dismissing applicants in comparative renewal proceedings, and we will, as commenters suggest, expeditiously consider such settlement agreements [footnote omitted].

13 FCC Rcd. at 16006. Of the eight remaining license renewal challenges that are candidates for such a hearing, five are those for which the instant settlement will remove Glendale or Maravillas as the competing applicant. Moreover, approval of this settlement may encourage settlement of the three other pending cases, reducing if not eliminating the Commission's docket of previously filed license renewal challenges.

15. The Communications Act does not impose limitation on settlements of bona fide applications. Nothing in Section 311(d) of the Communications Act or its legislative history prohibits the Commission from waiving either the timing or the limit on the amount of a monetary settlement if the agency otherwise

determines that no party has filed its application for the purpose of obtaining a settlement and that the agreement is consistent with the public interest, convenience and necessity. Indeed, in floor debate on Section 311(d), Representative Wirth specifically noted that "the intent of the Congress was not, in any way, to prevent an incumbent licensee from making a payment in excess of expenses to a party challenging that licensee as a means of settling a challenge except when the applicant was not bona fide." ¹³

16. FCC's broad authority to approve settlement under the good cause showing here. There is no doubt that the Commission has broad authority under Section 311(d) to decide whether settlement agreements should be approved or disapproved under the public interest, convenience and necessity standard. ¹⁴ At the same time, the FCC has acknowledged that when abuse is not a factor, settlements are to be encouraged as "an efficient way to resolve comparative licensing proceedings, preserve funds for service to the public, and allow...[the] conserv[ation of] limited administrative resources." ¹⁵ Such settlement of ongoing litigation is to be favored:

¹³ 127 Cong. Rec. 18956 (1981).

¹⁴ Broadcast Renewal Applicants, 6 RR2d at 717. ("As long as the Commission determines that 'no party to the agreement filed its application for the purpose of reaching or carrying out such an agreement,' the Commission has broad authority under Section 311(d) to decide whether settlement agreements should be approved or disapproved under the public interest, convenience, and necessity standard.")

¹⁵ Id. at 716.

Given the facts that law and society both generally favor settlement of competing claims and that requiring an applicant to prosecute its application when it clearly has no interest in doing so would be anomalous, we believe that any detriment stemming from the loss of a choice between applicants is more than offset by the overall benefit to the public interest attributable to the termination of the litigation.¹⁶

Given the changed circumstances that have occurred since the filing of the Glendale and Maravillas applications, including abolition of the right to file applications challenging renewal applications and the administrative usefulness in disposing of the few historic cases that remain, this proposed settlement evidences exactly the kind of "good cause" the Commission indicated would need to be presented for it to consider further waivers of the settlement rules.^{17 18}

17. These factors have been reflected in the arms-length settlement of the litigating parties, which should be honored as a preferred means of resolution of the litigation. In this milieu, the terms of the settlement have been freely negotiated between the parties and reflect each party's estimate of the

¹⁶ Western Connecticut Broadcasting Co., 50 RR2d 1335, 1339 (1982).

¹⁷ Settlements in Comparative Broadcast Proceedings, 2 Com. Reg. 1240, 1243 (1996).

¹⁸ Trinity and NMTV have exceptionally strong records of providing public service, non-entertainment programming and outreach missions that address and meet society's greatest needs, including feeding and clothing the homeless, needy and poor, fighting drug and alcohol abuse, crime, suicide and despair through prevention and with counseling and guidance for the needy; pioneering, before it was ever required by law, extensive outreach and educational programming specially designed for children to teach them substantively, spiritually and morally. The public is clearly served by the continuation of this service.

value of settlement to it. As is true in all litigation settlements, each of the parties has weighed the litigation costs, the drain of litigation on the parties' other business and personal activities, and the prospects of prevailing/not prevailing in that litigation. The Amended and Superceding Settlement Agreement, including the reduced settlement amount, reflects these factors in light of the Commission's Decision, and is a marketplace decision of the type courts ordinarily respect. E.g., McDermott, Inc. v. Amclyde and River Don Castings, Inc., 511 U.S. 202, 212 (1994).

III.

Supporting declarations and conclusion

18. Attached as Exhibits 2-3 are declarations of principals of Glendale and Maravillas attesting that their applications were not filed for the purpose of reaching or carrying out an agreement regarding the dismissal or withdrawal of their applications and that the Amended and Superceding Settlement Agreement constitutes the complete agreement between the parties. Attached as Exhibits 4-5 are declarations of principals of Trinity and NMTV attesting that the Amended and Superceding Settlement Agreement represents the complete agreement between the parties.

19. For the reasons set forth above, and on the basis of the declarations attached, Glendale, Maravillas, Trinity and NMTV respectfully request that the Commission approve the Amended and Superceding Settlement Agreement and concurrently dismiss the applications of Glendale and Maravillas. Given the lengthy

pendency of these applications, the parties' ongoing efforts to settle their litigation and present to the Commission an acceptable agreement, the unconditional nature of the new agreement, and the Commission's prior indication that it would expeditiously consider comparative renewal settlements, it is respectfully requested that such expedited consideration be accorded here.

Respectfully submitted,

Trinity Broadcasting of Florida, Inc.

Trinity Chrstian Center of
Santa Ana, Inc.

Trinity Broadcasting of New York, Inc.

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Its Counsel

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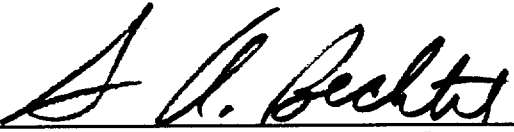
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